IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1952~~ 1953

No. ~~693~~ [redacted] 6

B. CLINTON WATSON, ET UX

versus

EMPLOYERS
LIABILITY ASSURANCE CORP., LTD.

BRIEF OF APPELLANTS OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

VAL IRION
RICHARD H. SWITZER
CLEVE BURTON
Attorneys for Appellants
1305 Slattery Building
Shreveport, Louisiana

LECOMTE, SHREVEPORT, LOUISIANA

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MAY IT PLEASE THE COURT:

The appellee moves to dismiss the appeal or affirm the judgment of the court below upon two grounds, the first being that the Court is without jurisdiction and the second being that no substantial federal question is presented.

The motion is without merit. For the convenience of the Court, we shall discuss each ground of the motion separately.

Appellants, in their jurisdictional statement filed pursuant to Rule 12, stated the nature of the case and rulings of the Court. Appellee does not controvert any fact thus stated.

1.

JURISDICTION

Appellee contends that because this appeal does not make The Gillette Company a party appellee, all necessary parties are not before the Court and consequently the Court lacks jurisdiction of the appeal.

The Gillette Company is neither a necessary nor a proper party appellee. A short statement of the facts of the case will make this abundantly clear.

The suit was originally instituted in a court of the State of Louisiana against the appellee as liability insurer of The Gillette Company, a Delaware corporation, as permitted by Louisiana law *(Louisiana Revised Statutes of 1950, Title 22, Section 655)*. It was removed by appellee to the United States District Court for the Western District of Louisiana, on diversity grounds.

After removal, appellants sought to make The Gillette Company an additional defendant, alleging joint and several liability unto them, alleging that while The Gillette Company was not authorized to do business in Louisiana, and had not complied with the laws of Louisiana applicable to foreign corporations which desired to do business in Louisiana, the company was actually, in de-

fiance of those laws, doing business in Louisiana. The District Court, in the exercise of its discretion, upon objection by The Gillette Company and appellee, refused to permit the filing of the amended petition seeking to join that company as an additional defendant, making its ruling under the provisions of Rule 21 of the Federal Rules of Civil Procedure.

Appellee filed a motion to dismiss as to it on the ground that the statutes of Louisiana permitting a direct action against it without first obtaining judgment against its assured was unconstitutional as violating various provisions of the United States Constitution.

The District Court dismissed appellants' Claim against The Gillette Company on the ground that it could not be brought into the case as a defendant AFTER removal, and dismissed appellants' claim against appellee upon the ground that the Louisiana statute permitting suit against it was unconstitutional.

The Court of Appeals affirmed upon appellants' appeal on the same grounds as the District Court ruled, namely, that the District Court properly exercised its discretion in refusing to permit The Gillette Company to be made a party defendant AFTER removal, and as to appellee, that the Louisiana statutes in question were unconstitutional.

Appellants have appealed to the Supreme Court under 28 U.S.C. 1254(2), an Act of Congress permitting appeals to the Supreme Court from the Court of Appeals

when that Court has held a State statute unconstitutional. This statute further provides that "the review on appeal shall be restricted to the Federal question presented."

The Gillette Company has not the slightest interest in the Federal question presented. It cannot be affected in the slightest by whatever ruling this Court may make upon the Federal question.

The Gillette Company is blowing both hot and cold. It maintained in the District Court that it was an improper party defendant and the District Court sustained that position. In the Court of Appeals The Gillette Company again insisted that it was an improper party defendant and there, again, its position was maintained. It now takes the position, in this Court, *for the first time*, that it *is* a necessary and proper party defendant. This contradictory position cannot be justified upon any grounds.

The only parties who can possibly be affected by this appeal are the appellants and Employers. The Gillette Company cannot be affected in any way, particularly since the statute declared unconstitutional by the Court below in no way applies to it or affects it. The judgment of the Court below in favor of The Gillette Company is final and the suit as to it is at an end. Whatever may be the final decision of this Court will in no way bear upon The Gillette Company nor touch it in any way.

Appellants had no right to appeal to this Court from a ruling that within the discretion of the trial Court

an amended petition seeking to join an additional defendant should not be allowed. Their appeal, by statute, is limited to the Federal question presented and then only as to the party affected thereby.

The appeal in this case is proper and is supported by these decisions:

> *Basket v. Hassel, 107 U. S. 602-606, 27 L. Ed. 500;*
>
> *Amadeo v. Northern Assurance Co., 201 U. S. 194 - 202, 50 L. Ed. 722;*
>
> *Winters v. United States, 207 U. S. 564-578, 52 L. Ed. 340.*

Each of these cases holds that a party to an action who has no legal interest, either in maintaining or reversing the decree, is not a necessary party to the appeal therefrom.

The decisions cited by appellee in support of its contention that The Gillette Company should be an appellee do not support its position here. They lay down the general rule that all parties who will be affected by the decree must be made parties, but it has been shown that The Gillette Company cannot possibly be affected by the decree here and has no interest in the judgment from which appealed.

Hartford Accident & Indemnity Co. v. Bunn, 285 U. S. 169, 76 L. Ed. 685, cited by appellee, is full authority against its contention. It was there held that the Supreme Court will not undertake to explore the record to ascer-

tain what issues were relied upon in courts below, but will accept the terms of the judgment as entered.

Following this rule, and looking to the judgment entered, all conceivable doubt evaporates and there cannot be any doubt as to the holding of the lower courts.

2.

SUBSTANTIAL FEDERAL QUESTION PRESENTED

On this branch of the case, appellee does not dispute that the Court of Appeals held the statute of Louisiana in question to be unconstitutional and void as offending the Federal Constitution. What appellee is seeking to do in its motion to affirm or dismiss is to argue here the merits of its plea of unconstitutionality.

The sole question on the pending motion is whether appellants were "relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States." (28 U.S. Code, 1254(2)).

That appellants relied upon a state statute, Louisiana Revised Statutes of 1950, Title 22, Section 655, is, of course, undenied. But appellee contends that the Court of Appeals merely held this statute inapplicable to contracts of insurance executed and delivered outside the State. Appellee is demonstrably in error.

In the absence of such a statute, appellants could not have sued at all. The best evidence of the fact that

both appellee and the Court of Appeals actually believed the statute applicable is that appellee so contended in its motion to dismiss, filed by it in the District Court. Furthermore, the judgment signed by the District Court in so many words adjudges the statute to be unconstitutional and the Court of Appeals agreed. The statute in its very essence makes itself applicable to this appellee and only if it be unconstitutional would appellee be unaffected thereby.

Were this not correct, then the words of the statute that it applies to all insurance contracts whether written in Louisiana "or not", become meaningless and the words "or not" become surplusage.

It would seem to be inappropriate to argue the constitutionality of the statute, pro and con, at this time. Appellee's position begs the question.

Very serious questions of State rights are involved. The authority of the State to regulate insurance companies operating within its boundaries is in question; the right, or lack of right, of foreign corporations to do business within the State, is involved, and the authority of the State to impose conditions upon that privilege is at stake; the police power of the State to protect individual citizens and legal visitors within its boundaries is sought to be denied.

We had wished not to argue the errors of the Court below, when the sole question before the Court now is one of jurisdiction. But, appellee having done so, we shall cover the matter briefly.

The Supreme Court of Louisiana, the Court of last resort in Louisiana, has held the statute under consideration to be procedural. *Home Insurance Co. v. Highway Insurance Underwriters,* *La.* , *62 So. 2d 828 (1953).* So has the Court of Appeal of Louisiana, 2d Circuit, a Court in the Louisiana system roughly parallel to the U. S. Courts of Appeals. *Churchman v. Ingram, 56 So. 2d 297.* If it be true that the statute is procedural, then no question of substantive due process can possibly be involved. The Court of Appeals in the present case refused to discuss, much less follow, the State Courts on this point. Under the holding of the Supreme Court in *Klaxon v. Stentor Electric. Mfg. Co., 313 U. S. 487, 85 L. Ed. 1477,* it was the duty of the Court of Appeals to follow the State Court in deciding conflict of laws rules.

Even if it be conceded that the Court of Appeals might validly sit as a Court of first instance in deciding whether the questioned law is procedural or substantive, and so sitting, decides in favor of substance, then the Court of Appeals erred in holding the statute to be unconstitutional under settled law respecting the interest of a State in regulating insurance companies doing business within its borders and the right of a State to impose conditions and obligations upon foreign corporations seeking the privilege of doing business therein.

Without, at this time, going into the ramifications of constitutional law as applied to the Louisiana statute involved, it cannot be questioned that the State has a sovereign interest in regulating insurance companies do-

ing business within its territory; it cannot be disputed that the State has a like interest in protecting its citizens and legal visitors in their contact with insurance companies. Louisiana seeks by these laws to make insurance companies doing business in Louisiana answer to their obligations for torts of their assureds committed in Louisiana; this is neither arbitrary nor unreasonable. Louisiana is not alone in seeking to simplify litigation in the respect it has by these statutes. Other States have somewhat similar laws, including California, Alabama, Georgia, Kansas, New Mexico, Oklahoma, Rhode Island, South Carolina, Tennessee and Wisconsin.

The question is of utmost importance. It relates to the rights of injured parties, and the authority of the State to protect them, when they are injured by the negligence of distant corporations, when those injuries occur in Louisiana, and enables them to have their rights determined at the place of injury, rather than at excessive cost thousands of miles away and in a hostile atmosphere.

The foregoing answers the points in appellee's motion. Other serious and substantial questions involved are set forth in our jurisdictional statement. It would be difficult and inappropriate at this stage, without a printed record or even an unprinted record consecutively paged to which reference can be made, to elaborate our contentions. Further argument and analysis of the record properly await the hearing on the merits. The case is within the appellate jurisdiction of this Court. It presents substantial questions.

We believe it sufficient here to show that the effects of the Louisiana statutes under attack are far less far-reaching than those of New York, California and Washington which were upheld by the Supreme Court in *Hoopeston Canning Co. v. Cullen, 318 U. S. 313, 87 L. Ed. 777; California State Automobile Association Inter-Insurance Bureau v. Maloney, 341 U. S. 105-111, 95 L. Ed. 788; State of Washington v. Superior Ct. of Washington, 289 U. S. 361, 77 L. Ed. 1256* and *International Shoe Co. v. Washington, 326 U. S. 310, 90 L. Ed. 95.*

The cases cited by appellee, beginning with *Knop v. Monongahela River Consol. Cole & Coke Co., 211 U. S. 485, 53 L. Ed. 294*, through *Ferry v. King County, 141 U. S. 668, 35 L. Ed. 895*, listed under paragraph 2 of its motion, subhead "Motion to Dismiss", are manifestly inappropriate. In every one of them, with one exception, there was no holding by the lower Court that the statute involved was unconstitutional. The one exception is *Slaker v. O'Connor, 278 U. S. 188, 73 L. Ed. 258*, wherein there was no final judgment rendered below and the attempted appeal was from an interlocutory decree.

There can be no question as to the holding here. The judgment of the District Court, affirmed in toto, recites that "Acts 541 and 542 of the Louisiana Legislative Session of 1950, insofar as they apply to an insurance company issuing and delivering a policy of public liability insurance outside the State of Louisiana, be and the same are *hereby declared to be unconstitutional, null and void.*" (Emphasis supplied).

If the Louisiana statutes do not apply to appellee, the court below could not have found them to be "unconstitutional, null and void." It would merely have construed the laws to be inapplicable, even though they do apply, in the words of the statutes themselves. An unlawful interference can occur only when a statute does apply but is invalid as repugnent to the federal laws.

The right of appeal accrues when there was properly drawn in question a particular unconstitutional application of the state statute rather than the validity of the statute as a whole. *Dainke-Walker Co. v. Bondurant, 257 U. S. 282, 66 L. Ed. 239; Furst v. Brewster, 282 U. S. 493, 75 L. Ed. 478.*

Appellee urges that the questions on which the decision of this case depends are so well settled as not to need further argument. It cites four cases in support of the position. None supports it.

New York L. Ins. Co. v. Head, 234 U. S. 149, 58 L. Ed. 1259, holds merely that a contract, *not to be operative in* Missouri, and made by citizens of New Mexico and New York respectively, cannot be validly legislated upon by Missouri. Here it is not disputed that the contract would be, and was, operative in Louisiana.

Aetna L. Ins. Co. v. Dunken, 266 U. S. 389, 69 L. Ed. 342, holds only that a subsequent policy of insurance issued by the terms of a primary one, made in Tennessee, is still a Tennessee contract and unaffected by the laws of Texas, where the insured happened to reside when the

subsequent policy came into effect. This case is itself authority for appellants' position that a substantial question of constitutional law is presented here.

Home Insurance Co. v. Dick, 281 U. S. 397, 74 L. Ed. 926, contains the holding, again, that Texas cannot validly legislate respecting contracts made outside its borders and *not operative* within those borders. Here again, the case supports appellants and not appellee, because it was there recognized that a State may validly legislate respecting contracts validly made elsewhere when performance within its territory would violate its laws, and this is especially true if the statutes in question here are procedural, since a State may prescribe the kinds of remedies to be available in its courts and dictate the practice and procedure in pursuing those remedies.

Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143, 78 L. Ed. 1178 holds that provisions in a fidelity bond there involved went to the obligation of the contract. Here there is no question of obligation of contract since the contract was executed long after the passage of the legislation. *Ogden v. Sanders, 12 Wheat. 213, 6 L. Ed. 606.* Again, in the cited case, the contract was not operative within the boundaries of the State seeking to affect it. Furthermore, the holding of the Court was specially limited to the peculiar facts involved as pointed out by the Court at p. 150 of 292 U. S., p. 1182 of 78 L. Ed.

We do not analyze the authorities cited by appellee to the effect that consent to the deprivation of constitution-

al rights given as the extorted price of doing business in a state cannot prevent the assertion of those rights when they are challenged or sought to be denied, because appellants have never contended otherwise.

Appellants have always contended that appellee has not been deprived of any constitutional rights and that the statutes involved are constitutional. They have never contended, in any court, that the mere fact that appellee, in compliance with Act 542, actually consented to be sued in Louisiana on any of its policies, wherever written, estopped appellee from contesting the constitutionality of the statutes, or seeking to have the Courts declare them to be unconstitutional. Appellants simply say that the requirements of the statute that appellee so consent deprives it of no constitutional right.

Appellee's motion should be denied.

Respectfully submitted,

VAL IRION
RICHARD H. SWITZER
CLEVE BURTON
Counsel for Appellants

Office and Post Office Address:
1305 Slattery Building
Shreveport, Louisiana

CERTIFICATE

This is to certify that copies of this brief have been served on opposing counsel on this the _____ day of _____, 1953.

_____

Attorney for Appellants